United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1207

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA

Appellee

-against-

RONALD LEE ROBINSON

Appellant

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Docket No. 77-1207

BRIEF ON BEHALF OF APPELLANT RONALD LEE ROBINSON PURSUANT TO ANDERS v. CALIFORNIA

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PRELIMINARY STATEMENT UNDER SECOND CIRCUIT RULE 28

The judgment herein was rendered after a plea of guilty by the appellant to Count 2 of the indictment before United States District Judge THOMAS C. PLATT, in the United States District Court for the Eastern District of New York on March 25, 1977.

STATEMENT OF THE ISSUE

The sole issue in this case is whether there are any non-frivolous issues on appeal.

STATEMENT OF THE CASE

The appellant RONALD LEE ROBINSON, was indicted with one JAMES BLACK, on a seventeen count indictment charging conspiracy and the forgery of stolen United States Government checks, and theft from the mails. The appellant was originally convicted after trial in the United States District Court for the Eastern District of New York before United States District Judge JOHN R. BARTELS, and on appeal to this Court, the counts of the indictment charging theft from the mails were dismissed and the judgment of conviction was reversed and the case sent back for a new trial.

On January 25, 1977, the appellant pleaded guilty to Count 2 of the indictment before United States District Judge THOMAS C. PLATT in the

United States District Court for the Eastern District of New York. This count charged that on August 1, 1974 ROBINSON and BLACK, with intent to defraud the United States, uttered and publish a United States Treasury check in the sum of $2,995.00 payable to one Thony Terranova, upon which the name of the payee was forged, knowing the name of the payee to have been forged.

Prior to sentence the Probation Department of the Eastern District prepared a pre-sentence report to which objections were entered by counsel for the appellant at the time of the sentencing. A hearing on the report was conducted by JUDGE PLATT. The objections entered by the appellant at the time of the hearing were that the report stated that the appellant had an "egotistical air about him" and refused to give any information as to his personal finances. Further there was a statement on Page 19 of the report that "authorities advise that defendant made threats to execute his co-defendant or any other individual who testified as a Government witness". Objection was also made to a statement that "authorities estimate" that $80,000.00 in checks were stolen.

At the hearing the Government pointed out that there was one error in the pre-sentence report and the Assistant United States Attorney acknowledged the error in the report which stated that appellant threatened to kill BLACK or any other witness who would testify for the Government against him. The United States Attorney stated that the Government had no evidence that the appellant threatened anybody but JAMES BLACK. (App. P. 13) At the

hearing one SAMUEL BLACKBURN, an agent of the Drug Enforcement Agency, testified and put in evidence a tape which contained the voice of the appellant stating that he would "ice" JAMES BLACK which was interpreted as a slang term meaning to kill.

The next witness at the hearing was CLIFFORD S. HILLE, assigned to the New York City Department of Investigation. He stated that his investigation showed that there was a total of about $48,000.00 in stolen welfare checks passed through an account to which the appellant had access. He denied telling anyone that $80,000.00 in checks were stolen as set forth in the pre-sentence report. The next witness was KENNETH M. DONOHUE, an agent of the United States Secret Service. He stated that his investigation revealed that through the bank accounts $24,000.00 in stolen Treasury checks had been negotiated. The Court pointed out that in its opinion the statement in the pre-sentence report that $80,000.00 in stolen checks were negotiated in the account and that the Government had shown that only $72,000.00 in checks were negotiated, did not materially alter the proof of the report.

The Government stipulated to amend the report specifically that $72,000.00 worth in stolen checks were passed through the account instead of $80,000.00.

The Court then proceeded to sentencing and sentenced the appellant to a term of imprisonment of seven and one half years under the provisions of 18 U.S.C. 4405 B 2, to be served concurrent with sentences heretofore imposed by the Southern District of New York and the Supreme Court of Kings

County.

Following the sentencing the Government moved to dismiss Counts 1, 3, 4, 5, 6, 7, 10, 11, 12, 13, 14, 15, and 17 of the indictment. As a practical matter the Assistant United States Attorney was in error in that Counts 3, 5, 7, 9, 11, 13, 15, and 17 had already been dismissed by this Court on the appellant's appeal from the sentence imposed by JUDGE BARTELS.

POSSIBLE ISSUES ON APPEAL

The first possible issue on appeal is the length of the sentence imposed in view of the appellant's prior work record and the statements of the pre-sentence report showing his good relations with the Court and his family.

Actually the issue here is whether or not the sentence of the appellant was unduly harsh. It has long been the rule of this Court that where a sentence has been imposed which is within the maximum limits which the District Court could have imposed, it will not be disturbed. In United States v. Mejias, Dkt. No. 76-1384, slip op. 2269, 2292 (2d Cir., March 10, 1977), this court, in upholding the sentence in that case, unequivocally stated the law in this Circuit to be that "[s]entences imposed within the statutory maximum are not reviewable in this circuit, absent the possibility that the sentence was based on material misinformation or misunderstanding concerning a defendant. . . . . or on constitutionally impermissible factors". See also Dorszynski v. United States, 418 U.S. 424, 431 (1974);

United States v. Stein, 544 F.2d 96, 101 (2d Cir. 1976); United States v. Robin 545 F.2d 775, 779 (2d Cir. 1976), clarified on rehearing en banc, slip op. 2591 (March 30, 1977). Therefore, any claim that the seven and one half year sentence imposed is unduly harsh in light of the crime to which he pleaded guilty is not subject to review. United States v. Tramunti, 513 F.2d 1087, 1120, cert. denied, 423 U.S. 832 (1975); United States v. Velazquez, 482 F.2d 139, 142 (2d Cir. 1973); United States v. Minues, 142 F. 2d 388, 390 (2d. Cir.) cert. denied, 323 U.S. 716 (1944). Thus, any possible issue to be raised on that ground would be frivolous.

A further reading of the hearing on the pre-sentence report leads inevitably to the conclusion that the pre-sentence report was corrected in the presence of JUDGE PLATT which would lead to the conclusion that the admitted error in the pre-sentence report did not improperly influence the sentence imposed by the court.

The objection as to the statement that the appellant threatened to kill any witness for the Government who would testify against him was corrected by the Assistant United States Attorney in a statement at the outset of the hearing:

> We have no evidence that he threatened anybody but James Black and the Government is prepared to put on evidence to substantiate that allegation.
> (App. P. 13)

The tape was then heard by all persons present in the court. The tape itself was not part of the case to which the appellant pleaded guilty but

was evidence in another matter and not subject to attack in this case.

The statements as to the amount of money showed that approximately $72,000.00 in stolen checks passed through bank accounts in question. The Probation report stated that $80,000.00 in checks and the Government stipulated at the time of the hearing that it would agree to a change in the report from $80,000.00 to the amount testified to at the hearing. Assistant United States Attorney JONATHAN MARKS stated this as follows:

> I will stipulate to amend the report as Your Honor has suggested and I will also stipulate, in the amendment of the report, to stipulate that $73,000.00 worth of stolen checks were run through the account, instead of $80,000.00.

Under the circumstances the corrections in the pre-sentence report were amply brought to the attention of the sentencing judge and he then imposed sentence which was within the maximum prescribed by the statute which is set forth in 18 U.S.C. Section 495, the offense to which the appellant pleaded guilty as follows:

> Shall be fined no more than $1,000.00 or imprisoned not more than 10 years or both. (18 U.S.C. 495)

There are no other questions of law which could be raised on appeal. There are no non-frivolous issues on which to appeal.

CONCLUSION

For the above stated reasons there are no non-frivolous issues which can be raised on appeal. Accordingly, it is respectfully requested that

JOHN C. CORBETT be relieved as counsel on this appeal.

Respectfully submitted,

JOHN C. CORBETT
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RONALD LEE ROBINSON

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